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DR DZUL KHAINI HJ HUSAIN & ORS v. DIRECTOR OF LANDS AND MINES OFFICE (KUALA LUMPUR) & ORS (NO 3)

HIGH COURT MALAYA, KUALA LUMPUR
HANIPAH FARIKULLAH J
B [JUDICIAL REVIEW NO: WA-25-7-01-2016]
26 SEPTEMBER 2016

C ***CIVIL PROCEDURE:*** *Judicial review – Application for – Validity of land acquisition – Whether State Authority has power to acquire strata properties – Whether procedure for land acquisition complied with – Whether intended compulsory acquisition of land necessary – Whether land acquisition in violation of art. 13(1) of Federal Constitution – Rules of Court 2012, O. 53 r. 3*

D ***LAND LAW:*** *Acquisition of land – Validity – Whether State Authority has power to acquire strata properties – Whether procedure for land acquisition complied with – Whether intended compulsory acquisition of land necessary – Whether land acquisition in violation of art. 13(1) of Federal Constitution – Land Acquisition Act 1960*

E The whole land ('the land') under the Ampang Park Shopping Centre ('the AP') was compulsorily acquired for the Mass Rapid Transit project ('MRT project'). In this judicial review application, the registered owners of 62 stratified properties at the AP ('the applicants') challenged the validity of the acquisition of the land under the Land Acquisition Act 1960 ('the LAA') on the grounds that (i) there was no power given under the LAA to acquire
F any land registered under the Strata Titles Act 1985 ('the STA') and the acquisition was in violation and/or in breach of art. 13(1) of the Federal Constitution; and (ii) only the underground land beneath the AP was required for the construction of the MRT project and hence, the intended acquisition of the land, including the AP located on the surface of the land, was unnecessary. The respondents raised a preliminary objection that the
G applicants had failed to cite the proper party, namely the State Authority for Wilayah Persekutuan. It was further submitted that the first and second respondents were not the appropriate authorities who made the decision to compulsorily acquire the land. The other issues highlighted for the court's consideration were (i) whether the State Authority has the power to acquire
H strata properties; (ii) whether there was procedural non-compliance; and (iii) whether the intended compulsory acquisition of the land was necessary.

Held (dismissing application):

(1) The first and second respondents were not the decision-makers in
I acquiring the land. The decision-maker was the Government of Malaysia. The first and second respondents were only empowered to administer and implement the compulsory land acquisition process after

a decision to compulsorily acquire the land concerned was made by the State Authority *ie,* the Government of Malaysia. Therefore, the proper party to this action should be the Government of Malaysia. (paras 31 & 34)

(2) There was no merit in the applicants' submission that there was no power given under the LAA to acquire any land registered under the STA. The master titles were not extinguished by reason of the issuance of the strata titles. As such, the LAA remains relevant and is applicable for the intended compulsory acquisition of parcels subjected to a strata title scheme. The endorsement of the master title to the land was reflected on the applicants' strata titles to the parcels in the land in the prescribed Form 4 of the STA. The applicants' strata titles were, therefore, dependent on the master title of the land. (paras 40 & 43-44)

(3) After a *gazette* was published, the first respondent gave notification of the intended acquisition of the land on which AP was situated, which was published pursuant to s. 4(1) of the LAA for the purpose of the MRT project. This was followed by a declaration in Form D which was published in a *gazette* pursuant to s. 8 of the LAA. Next, the notices of enquiry in Form E under s. 10 of the LAA were issued by the Land Administrator to the owners of the parcels of the land. Therefore, the acquisition of the land was lawful and it was carried out in consistent with the LAA. (paras 47-50)

(4) The construction of the MRT Ampang Park Station underground bore tunnels and the underground pedestrian link way would involve, *inter alia*, piling, excavation works and the boring of tunnels. Given the nature of the works to be carried out, the AP has to be demolished in order to ensure that the construction works are carried out safely and efficiently. Furthermore, the land, together with the AP on the surface of the land, would be required to facilitate the development and construction of the MRT project and not merely the underground land beneath the AP. (para 52)

Case(s) referred to:

Ahmad Saman v. Kerajaan Negeri Kedah [2004] 1 CLJ 211 CA ***(refd)***

Ambiga Sreenevasan v. Ketua Pengarah Imigresen, Malaysia & Ors [2012] 7 CLJ 170 HC ***(refd)***

Bandar Utama Development Sdn Bhd & Anor v. Lembaga Lebuhraya Malaysia & Anor [1997] 4 CLJ 725 HC ***(refd)***

Kijal Resort Sdn Bhd v. Pentadbir Tanah Kemaman & Anor [2015] 3 CLJ 861 FC ***(refd)***

Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd [2010] 5 CLJ 123 CA ***(refd)***

Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v. Ong Gaik Kee [1983] 1 LNS 14 FC ***(refd)***

Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***

Syed Omar Abdul Rahman Taha Alsagoff & Anor v. The Government of the State of Johore [1978] 1 LNS 190 PC ***(refd)***

Legislation referred to:
Federal Constitution, arts. 13(1), 39, 40
Land Acquisition Act 1960, ss. 3(1)(a), 4(1), 8, 10(3), 52
Strata Titles Act 1985, s. 5

For the applicants - Yee Jun Hong, Jason Ng Kau, Ng Boon Siong, Tan Zhang Wei, Ng Yew Wei, U Wai Bing & Tan Li Yue; M/s Jason Ng & Partners
For the proposed intervener - Robert Lazar & Lai Wai Fong; M/s Shearn Delamore & Co
For the respondents - Nik Haizie Azlin Nabidin; AG's Chambers

Reported by Najib Tamby

JUDGMENT

Hanipah Farikullah J:

Introduction

[1] The applicants filed a judicial review application to quash the decision of the State Authority to acquire the Ampang Park Shopping Centre, Lot 153, Grant 41988. ("Ampang Park").

[2] By the present judicial review application, the applicants are challenging the validity of the intended compulsory acquisition of the parcels in the said land under the Land Acquisition Act 1960 (LAA 1960) for the purpose of the development of the Project MASS Rapid Transit Jajaran Sungai Buloh-Serdang-Putrajaya ("the MRT project").

[3] It is the applicants' case that there is no power given under the LAA 1960 to acquire any land registered under the Strata Titles Act 1985 (STA 1985) and thus the intended acquisition is in violation and/or in breach of art. 13(1) of the Federal Constitution.

[4] The applicants are also challenging the validity of the intended acquisition of the said land on the ground that only the underground land beneath the Ampang Park Shopping Centre is required for the construction of the MRT Line 2 and hence the intended acquisition of the said land, including the Ampang Park Shopping Centre located on the surface of the said land, is unnecessary.

The Background Facts

[5] The relevant facts disclosed in the statement and affidavit filed in support of the application and that filed by the respondents in opposition to the application are as follows.

[6] The 39 applicants are the registered owners of the 62 stratified properties at Ampang Park Shopping Centre respectively seeking to challenge the decision making process of the respondents in acquiring Ampang Park.

[7] The MRT project involves the construction of an urban rail network which, together with the existing light rail transit ('LRT'), monorail, KTM Komuter, KLIA Ekspres and KLIA Transit systems, will form the backbone of the public transportation system of the greater Kuala Lumpur/ Klang Valley.

[8] Presently, two (2) out of the three (3) MRT Lines envisaged under the MRT project have been approved for implementation, including the Sungai Buloh-Serdang-Putrajaya Line, MRT Line 2. The proceedings herein relate to the proposed development of MRT Line 2.

[9] The third respondent is a special purpose vehicle appointed by the Government of Malaysia to be the developer and asset owner of, *inter alia*, the MRT Lines.

[10] It is not disputed that the third respondent is responsible for, *inter alia*, the management of the procurement process and the submission of all key project documents in relation to the design, construction, testing and commission of the MRT project. The third respondent is also responsible for the construction and implementation of the MRT project which includes monitoring and tracking the construction of all elevated structures, stations and depots of the MRT project and supervising underground works including tunnelling and construction of underground station.

[11] The MRT Line 2 has a total length of 52.2km, of which 13.5km will be underground. There will be 36 stations, 11 of them underground, 24 elevated and one to be built on the ground but with tracks and platforms beneath road level.

[12] By a *gazette* published on 21 July 2015, the Director of Land and Mines of the Federal Territory of Kuala Lumpur gave notification of the intended acquisition of the said land on which the Ampang Park Shopping Centre is situated, which was published pursuant to s. 4(1) of the LAA 1960, for the purpose of the MRT Line 2. This was followed by a declaration in the prescribed Form D, which was published in a *gazette* on 2 September 2015 pursuant to s. 8 of the LAA 1960.

[13] This was followed by the issuance of the prescribed notices of enquiry in Form E pursuant to s. 10 of the LAA 1960 by the Land Administrator to the owners of the parcels in the said land. The notices are essentially intended to provide notification of the commencement of the acquisition proceedings and the date of enquiries for the hearing of claims to compensation and interests in the land intended to be acquired compulsorily.

Issues

[14] The issues to be considered by the court are as follows:

A (i) whether the applicants have cited the wrong party;

(ii) whether the State Authority has the power to acquire strata properties;

(iii) whether there was procedural non-compliance to acquire the land; and

(iv) whether the intended compulsory acquisition of the said land is necessary.

B

Preliminary Issues

Wrong Party

[15] I will firstly consider the preliminary objection raised by the respondents.

C **[16]** In this proceeding, the respondents raised a preliminary objection that the applicants had failed to cite the proper party, ie, the State Authority for Wilayah Persekutuan.

[17] The respondents submitted that the 'State Authority' in the LAA 1960 for Wilayah Persekutuan refers to the 'Land Executive Committee'. In
D support of the respondents position, learned Senior Federal Counsel and learned counsel for the third respondent relied on the Federal Territory (Modification of National Land Code) Order 1974 (as amended), which established a 'Land Executive Committee for the Federal Territory' for the purposes of exercising the powers and perform the duties conferred or imposed
E on them by or under the NLC.

[18] It is the respondents' case that the judicial review and the reliefs sought cannot lie against the first and the second respondents as they are not the appropriate authorities who made the decision to compulsorily acquire the said land.

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[19] To support the respondents' contention, I was referred to the following cases: (*Ambiga Sreenevasan v. Ketua Pengarah Imigresen, Malaysia & Ors* [2012] 7 CLJ 170; [2012] 1 MLJ 92, *Bandar Utama Development Sdn Bhd & Anor v. Lembaga Lebuhraya Malaysia & Anor* [1997] 4 CLJ 725; [1998] 1 MLJ 224 and *Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn*
G *Bhd* [2010] 5 CLJ 123.

[20] In my view, pursuant to the Federal Territory (Modification of Land Acquisition Act 1960) (Amendment) Order 1975 (PUA/75) (made pursuant to Act A206) the appropriate authority ("the State Authority") that made the
H decision to compulsorily acquire the said land in Wilayah Persekutuan Kuala Lumpur is the "Federal Government".

[21] Insofar as lands located in the Federal Territory of Kuala Lumpur, such as the said land, the meaning of "State Authority" in the LAA 1960 was modified in consequence of the passing of the Constitutional (Amendment)
I (No 2) Act 1973 (Act A206).

[22] The Federal Territory (Modification of Land Acquisition Act 1960) (Amendment) Order 1974 (PU(A)81/74) which came into force on 1 February 1974 provides as follows:

> CONSTITUTION (AMENDMENT) (No. 2) ACT, 1973
>
> In exercise of the powers conferred upon him by section 6(4) of the Constitution (Amendment) (No. 2) Act, 1973 the Yang di-Pertuan Agong hereby makes the following order:
>
> 1. This order may be cited as the Federal Territory (Modification of Land Acquisition Act, 1960) (Amendment) Order, 1975, and shall be deemed to have come into force 1st February, 1974.
>
> 2. The Federal Territory (Modification of Land Acquisition Act, 1960) Order, 1974, is hereby amended by substituting for the words "Government of the Federation" appearing in subparagraph (b) of paragraph 2 thereof the words "Yang di-Pertuan Agong".

[23] Pursuant to arts. 39 and 40 of the Federal Constitution, the Yang di-Pertuan Agong shall act in accordance with the advice of the Cabinet, represented by the Government of Malaysia.

[24] Hence, the decision maker to acquire the said land is the Government of Malaysia and not the Land Executive Committee.

[25] However, during the hearing of the leave application, the Attorney General Chambers informed this court that it has no objection to the applicants' application for leave to file this present judicial review application provided that the applicants withdraw the original first and second respondents named, which were "Kementerian Wilayah Persekutuan" (R1) and "Kerajaan Malaysia" (R2).

[26] It must be stressed that the first respondent, the second respondent and the third respondent were not present at the leave stage. The application at the leave stage being an *ex-parte* one, it was not served on the first respondent and the second respondent and the third respondent was added as a respondent pursuant to an application to intervene made to this court on 26 December 2016, ie, after the leave stage.

[27] Notwithstanding that, as the third respondent only became a party to the proceedings upon obtaining leave to intervene, in my view it can still raise the objection of wrong citation of party by the applicants.

[28] The respondents particularly the third respondent were not present at the hearing of the leave application was not in a position to raise any preliminary objection at that stage of the proceedings.

[29] In the case of *Kijal Resort Sdn Bhd v. Pentadbir Tanah Kemaman & Anor* [2015] 3 CLJ 861, the Federal Court states as follows:

A The putative respondents were not present at the hearing of the application at leave stage as at that point in time, by reason of the application being an *ex parte* one, it was not served on the putative respondents. The respondents, not having been served with the *ex parte* leave application, were of course not present at the hearing of the leave application and were of course not present at the hearing of the leave
B application and accordingly, not in a position to raise any preliminary objection at that stage of the proceedings.

[30] Further the present first and second respondents, ie, the Pengarah Tanah dan Galian Wilayah Persekutuan (Kuala Lumpur) (R1) and Pentadbir Tanah, Wilayah Persekutuan, Kuala Lumpur (R2) are not the decision makers as
C they perform different roles.

[31] In this present case, the first and the second respondents are only empowered to administer and implement the compulsory land acquisition process after a decision to compulsorily acquire the land concerned has been
D made by the 'State Authority' ie, the Government of Malaysia.

[32] The first respondent had, in its affidavit, confirmed that it is responsible for the land administration process in respect of land matters in the Federal Territory of Kuala Lumpur and is a member of the Committee for the Federal Territory of Kuala Lumpur (Jawatankuasa Kerja Tanah Wilayah Persekutuan
E Kuala Lumpur) responsible for receipt of applications for intended compulsory acquisition of land and making appropriate recommendations to the 'State Authority'.

[33] The second respondent is primarily responsible for the conduct of the enquiry proceedings for the acquisition, including issuance of the prescribed
F notices of enquiry and conducting enquiries into the interests of the persons claiming compensation and assessing the amount of compensation.

[34] Based on the above reasons, the first and the second respondent were not the decision maker to acquire the said land. In my view, the proper party to this action should be the Government of Malaysia. (*Bandar Utama*
G *Development Sdn Bhd & Anor v. Lembaga Lebuhraya Malaysia & Anor* (*supra*) followed)

Whether The State Authority Has The Power To Acquire Strata Properties

[35] The applicants contended that the existing provisions of the LAA 1960
H does not cater for compulsory acquisition of parcels which are subjected to a strata title scheme within the meaning of the Strata Titles Act 1985 ("STA 1985"), such as the parcels in the said land.

[36] Further, the applicants submitted that the Strata Management Act 2013 and the STA 1985 do not contain any clear provision on the law governing
I the land acquisition on stratified properties and/or do not stipulate any laws in relation to the procedure of the land acquisition of stratified properties.

[37] Learned counsel for the applicants argued that the decision to acquire the stratified properties is to deprive the applicants of their property by unconstitutional means and accordingly that decision has violated the fundamental rights of the applicants as entrenched in art. 13(1) of the Federal Constitution.

[38] In support of the argument that the proposed acquisition is unconstitutional, learned counsel for the applicants referred to the following cases:

(i) *Ahmad Saman v. Kerajaan Negeri Kedah* [2004] 1 CLJ 211;

(ii) *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135; and

(iii) *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v. Ong Gaik Kee* [1983] 1 LNS 14; [1983] 2 MLJ 35.

[39] The evidence shows that the said land is held under master title Lot 153, Grant 41988 Section 43, Bandar Kuala Lumpur. It is common ground that pursuant to a subdivision under a strata scheme within the meaning of STA 1985, the Ampang Park Shopping Centre located on the said land was then subdivided into parcels held under the strata scheme.

[40] I accept the approach submitted by learned counsel for the third respondent that the master title is not extinguished by reason of the issuance of the strata titles. As such, the LAA 1960 remains relevant and is applicable for the intended compulsory acquisition of parcels subjected to a strata title scheme based on the following reasons.

[41] The introduction of strata titles in respect of subdivision of buildings into parcels, are not inconsistent with the master titles prepared, issued and maintained in accordance with the NLC and must be read together. Both Acts must be construed and read together. In this regard, s. 5 of the STA 1985 provides as follows:

> 5. Construction of the Act
>
> (1) This Act shall be read and construed with the National Land Code as if it forms part thereof.
>
> (2) The National Land Code and the rules made thereunder, insofar as they are not inconsistent with the provisions of this Act or the rules thereunder, or are capable of applying to parcels shall apply in all respects to parcels held under strata titles ...

[42] Learned counsel for the third respondent correctly pointed out that the introduction of the computerization system of strata titles or the electronic land administration system of strata titles in any 'Land Registry', reinforces the fact that the strata titles are intended to be read with the master titles for the lands concerned. The 'Land Registry' responsible for the computerisation system of strata titles or the electronic land administration system of strata titles, as the case may be, means:

A (1) 'in the case of strata titles which are dependent on Registry titles, the office of the Registrar of Titles for the State', pursuant to Section 4A(2)(a) of the STA 1985 (which is *pari materia* with Section 4B(2)(b)(i) of the STA 1985; and

(2) 'in the case of strata titles which are dependent on Land Office B titles, the office of the Land Administrator for the District', pursuant to Section 4A(2)(b) of the STA 1985 (which is *pari materia* with Section 4B(2)(b)(ii) of the STA 1985.

[43] In the present case, the endorsement of the master title to the said land is reflected on the applicants' strata titles to the parcels in the said land in C the prescribed Form 4 of the STA 1985. The applicants' strata titles are therefore dependent on the master title to the said land.

[44] Having regard to the above matters with respect in my view there is no merit in the applicants' submission that there is no power given under the LAA to acquire any land registered under the STA 1985.

D *Procedural Non-Compliance*

[45] Learned counsel for the applicants submitted that the intended acquisition of the said land is unlawful and *ultra vires* based on the following grounds:

E (i) it contravenes s. 4 and s. 52 of the LAA 1960 as the construction of the MRT project will only involve the underground area and not the surface. Hence, the stratified properties above the surface are not needed;

F (ii) it contravenes s. 10(3) of the LAA 1960 as no Form D was attached with Form E to the applicants; and

(iii) it contravenes the LAA 1960 as the lands specified in Form D and Form E is totally different. Form D was in respect of the master title and Form E was in respect of the stratified properties. At all material times, no Form D was issued to the applicants. G

[46] It is now necessary to consider whether the procedures carried out by the first and the second respondents were in accordance with the LAA 1960.

[47] It is noted that by a *gazette* published on 21 July 2015, the Director of Land and Mines of the Federal Territory of Kuala Lumpur gave notification H of the intended acquisition of the said land on which the Ampang Park Shopping Centre is situated, which was published pursuant to s. 4(1) of the LAA 1960, for the purpose of the MRT Line 2.

[48] This was followed by a declaration in the prescribed Form D, which was published in a *gazette* on 2 September 2015 pursuant to s. 8 of the LAA I 1960. In my view, the notices premised on the master title of the said land do not render the land acquisition process invalid, as the master title remains valid notwithstanding the issuance of strata titles.

[49] This was followed by the issuance of the prescribed notices of enquiry in Form E in accordance with s. 10 of the LAA 1960 by the Land Administrator to the owners of the parcels in the said land. The notices are essentially intended to provide notification of the commencement of the acquisition proceedings and the date of enquiries for the hearing of claims to compensation and interests in the land intended to be compulsorily acquired.

[50] Based on the above reasons, the acquisition of the land was lawful and it was carried out in consistent with the LAA 1960.

Whether The Intended Compulsory Acquisition of The Said Land Is Necessary

[51] The applicants are challenging the validity of the intended acquisition of the said land primarily on the ground that only underground land beneath the Ampang Park Shopping Centre is required for the construction of the MRT Line 2 and hence, the intended acquisition of the said land, including the Ampang Park Shopping Centre located on the surface of the said land, is unnecessary.

[52] The third respondent had, in its affidavit, denied the applicants' allegation and instead contended that the intended acquisition of the said land, including the Ampang Park Shopping Centre located on the surface of the said land, is necessary to facilitate the development of the MRT Line 2 at Ampang Park for the following reasons:

(i) the construction of the proposed MRT Ampang Park station, underground bored tunnels and the underground pedestrian link way would involve, amongst others, piling, excavation works and the boring of tunnels. The excavation of the proposed Ampang Park MRT station box will be down to a depth of approximately 45m below the surface of the said land is required for the construction works;

(ii) given the nature of the works which have to be carried out, the Ampang Park Shopping Centre has to be demolished in order to ensure that the construction works are carried out safely and efficiently; and

(iii) the said land, together with the Ampang Park Shopping Centre on the surface of the said land, is required to facilitate the development and construction of the proposed MRT Ampang Park station and the MRT Line 2 and not merely the underground land beneath the Ampang Park Shopping Centre.

[53] In fact, there is no rebuttal evidence adduced by the applicants to dispute the necessity to compulsorily acquire the said land, together with the Ampang Park Shopping Centre for the purpose of the development of MRT Line 2.

[54] Hence, I am satisfied that the surface of the said land is needed for safety reason and to facilitate the development and construction of the proposed MRT Ampang Park station and the MRT Line 2.

A

Acquisition Is For Public Purpose

[55] The applicants accepted that the intended compulsory acquisition of the said land is for the purpose of the MRT project. The first respondent had, in its affidavit, confirmed that the said land was being compulsorily acquired for public purpose.

B

Conclusion

[56] For these reasons, in my view the intended compulsory acquisition of the said land meets the criteria of s. 3(1)(a) of the LAA 1960. (*Syed Omar bin Abdul Rahman Taha Alsagoff & Anor v. The Government of the State of Johore* [1978] 1 LNS 190; [1979] 1 MLJ 49 and *Ahmad Saman v. Kerajaan Negeri Kedah* (*supra*) followed)

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[57] Accordingly, the applicants' application is dismissed.

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